STATE OF MICHIGAN

COURT OF APPEALS

PROGRESSIVE MICHIGAN INSURANCE COMPANY,

Plaintiff-Appellee/Cross-Appellant,

v

AMERICAN COMMUNITY MUTUAL INSURANCE COMPANY,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
June 17, 2003

No. 237926
Wayne Circuit Court
LC No. 00-017169-CZ

PROGRESSIVE MICHIGAN INSURANCE COMPANY,

Plaintiff-Appellant,

v

AMERICAN COMMUNITY MUTUAL INSURANCE COMPANY,

Defendant-Appellee.

No. 238104
Wayne Circuit Court
LC No. 00-017169-CZ

Before: Cavanagh, P.J., and Gage and Zahra, JJ.

PER CURIAM.

These consolidated appeals involve a dispute between two insurance companies with respect to the coverage of medical expenses incurred by Nicholas DeVries and Michael Corso in two separate and unrelated automobile accidents. In Docket No. 237926, defendant appeals by leave granted and plaintiff cross-appeals the trial court's order granting in part and denying in part defendant's motion for summary disposition and granting in part and denying in part plaintiff's motion for summary disposition. In Docket No. 238104, plaintiff appeals as of right and defendant cross-appeals the same order. We affirm in part, reverse in part, and remand.

I. Facts and Procedure

The basic facts of these cases are uncontested. DeVries and Corso each had no-fault insurance policies with plaintiff and health insurance policies with defendant. Both DeVries and Corso were injured in separate and unrelated automobile accidents, DeVries as a passenger in an automobile and Corso as the driver of an automobile. Plaintiff provided benefits on behalf of DeVries and Corso for the injuries sustained as a result of their respective automobile accidents. Plaintiff then sought to recoup the medical expenses it paid on behalf of DeVries and Corso from defendant. When defendant refused to reimburse plaintiff, plaintiff brought the instant action. Both parties filed motions for summary disposition. After declaring that defendant's insurance policy was clear and unambiguous, the trial court ordered that plaintiff was entitled to reimbursement for its payment of benefits on behalf of DeVries because DeVries was a passenger in the vehicle and was not excluded from coverage under defendant's policy, but that plaintiff was not entitled to reimbursement for its payment of benefits on behalf of Corso because Corso was the driver of the vehicle and was excluded under defendant's policy. The trial court entered an order granting in part and denying in part defendant's motion for summary disposition and granting in part and denying in part plaintiff's motion for summary disposition.

II. Analysis

Both parties contend that the trial court erred in granting partial summary disposition in favor of the opposing party.

> A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 485; 502 NW2d 742 (1993). Affidavits, pleadings, depositions, admissions, and documentary evidence are considered in reviewing a motion for summary disposition pursuant to MCR 2.116(C)(10), and the evidence is viewed "in the light most favorable to the party opposing the motion." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Id.* [*Universal Underwriters Group v Allstate Ins Co*, 246 Mich App 713, 720; 635 NW2d 52 (2001).]

"A trial court's grant or denial of summary disposition under MCR 2.116(C)(10) is reviewed de novo on appeal." *Liberty Mut Ins Co v Michigan Catastrophic Claims Ass'n*, 248 Mich App 35, 40; 638 NW2d 155 (2001). This case also involves the interpretation of an insurance contract and requires a determination of whether the insurance contract was ambiguous, which are questions of law that are also reviewed de novo on appeal. *Farm Bureau Mut Ins Co v Nikkel*, 460 Mich 558, 563; 596 NW2d 915 (1999); *Morley v Automobile Club of Michigan*, 458 Mich 459, 465; 581 NW2d 237 (1998).

The dispute in this case revolves around the motor vehicle exclusions and coordination of benefits provisions of defendant's policies. The "Insurance with Other Insurers" sections of defendant's policies place the insureds on notice that the insureds "*may* have Other Coverage with another insurer that provides benefits for the same expenses . . . ." (Emphasis added.) DeVries' policy defines "Other Coverage," in relevant part, as "coverage that provides benefits for the same loss on an expense-incurred basis including . . . [a]utomobile medical payments insurance . . . ." Corso's policy contains a similar definition of "Other Coverage," but also

includes "personal injury protection under no fault automobile insurance." The "General Exclusions" sections of the policies specifically exclude coverage for "[t]reatment for injuries arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle." The parties dispute whether the motor vehicle exclusions apply to passengers of a motor vehicle and whether the policies are inherently ambiguous by providing for the coordination of benefits with automobile medical payments insurance or personal injury protection under no fault automobile insurance[1] and excluding coverage for treatment of injuries arising from a motor vehicle.

> When determining what the parties' agreement is, the trial court should read the contract as a whole and give meaning to all the terms contained within the policy. The trial court shall give the language contained within the policy its ordinary and plain meaning so that technical and strained constructions are avoided. A policy is ambiguous when, after reading the entire document, its language can be reasonably understood in different ways. If the trial court determines that the policy is ambiguous, the policy will be construed against the insurer and in favor of coverage. However, if the contract is unambiguous, the trial court must enforce it as written. [*Royce v Citzens Ins Co*, 219 Mich App 537, 542-543; 557 NW2d 144 (1996) (citations omitted).]

With respect to the interpretation of exclusion provisions, the Michigan Supreme Court stated the following:

> Exclusionary clauses in insurance policies are strictly construed in favor of the insured. However, coverage under a policy is lost if any exclusion within the policy applies to an insured's particular claims. Clear and specific conclusions must be given effect. It is impossible to hold an insurance company liable for a risk it did not assume. [*Auto-Owners Ins Co v Churchman*, 440 Mich 560, 567; 489 NW2d 431 (1992) (citations omitted).]

Defendant contends that the phrase "use of a motor vehicle" in the motor vehicle exclusion provisions of its policies applies to passengers of motor vehicles, and that DeVries, as a passenger, should fall under this exclusion. We agree. In *Michigan Mut Ins Co v Dowell*, 204 Mich App 81, 84; 514 NW2d 185 (1994), the insurance policy between the parties excluded coverage for the ownership, maintenance, or use of any vehicle. This Court determined that the phrase "use of any vehicle" in the context of the insurance provision was ambiguous and that a reasonable interpretation of the word "use" in the context of the exclusion included the use of a vehicle for transportation by a passenger. *Id.* at 88-89.

In the present case, the DeVries' insurance policy excludes from coverage "[t]reatment for injuries arising out of the ownership, operation, maintenance or *use of a motor vehicle as a motor vehicle*." (Emphasis added.) Applying *Dowell*, we conclude that the "use" of a motor vehicle encompasses the use of a motor vehicle for transportation by a passenger. Accordingly,

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[1] As discussed, "personal injury protection under no fault automobile insurance" is included within the definition of "Other Coverage" in Corso's policy, but not DeVries' policy.

the trial court erred in determining that the general motor vehicle exclusion provision did not apply to the injuries sustained by DeVries because he was a passenger in an automobile.

Plaintiff argues that, even if the motor vehicle exclusion applies to DeVries' injuries, defendant's policies are inherently ambiguous because the motor vehicle exclusions are directly contradictory to the coordination of benefits provisions and render them superfluous. We disagree. In *American States Ins Co v Kesten*, 221 Mich App 330, 333; 561 NW2d 486 (1997), this Court addressed whether an exclusionary provision in the defendant's insurance policy conflicted with the defendant's "other insurance" provision. The Court noted that the "other insurance" clause tells how to apportion the dollars when two or more policies applied to the same covered act. *Id*. at 333 n 2. However, this Court determined that because the exclusion applied, the "other insurance" clause was inapplicable. *Id*. at 333. The Court further noted that because the defendant's policy provided no coverage, and only the plaintiff's insurance policy applied, there was nothing to apportion between the two carriers. *Id*. at 333 n 2.

Here, as in *Kesten*, defendant's "Insurance with Other Insurers" provision does not apply when an injury is not a covered charge or is excluded under the policy. As discussed, the motor vehicle exclusions of defendant's policies exclude coverage for both DeVries and Corso. Therefore, because the exclusions apply, there is no need to coordinate benefits and the "Insurance with Other Insurers" sections of the policies are inapplicable.

Plaintiff's argument that the policies' motor vehicle exclusions are rendered ambiguous by the "Insurance with Other Insurers" provisions lacks merit. The "Insurance with Other Insurers" provisions in the policies state, in pertinent part, "You or a Family Member *may* have Other Coverage with another insurer that *provides benefits for the same expenses* on an expense-incurred basis." (Emphasis added.) These provisions give no guarantee that the policies will always coordinate coverage with another insurer that provides personal injury protection under no fault automobile insurance or automobile medical payments insurance. Because these clauses state that they "may" apply, they do not necessarily apply in all "Other Coverage" situations. The critical question is whether plaintiff's policies provided benefits for the same expenses covered by defendant's policies. They did not. Defendant's policies expressly exclude insurance benefits for "[t]reatment for injuries arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle." This is exactly the type of insurance benefit provided by plaintiff's policy. Accordingly, under the language of defendant's policies, the "Insurance with Other Insurers" section is inapplicable because defendant's policies do not provide benefits for the same expenses provided under plaintiff's policies. The coordination of benefits provisions of defendant's policies are not rendered meaningless by our interpretation because defendant's policies do not state that defendant will always coordinate benefits with another insurer that provides personal injury protection benefits under no fault automobile insurance or automobile medical payment insurance. Rather, defendant's policies state that *if* the insured has other insurance that provides benefits for the same expenses covered by defendant's policy, such coverage shall be coordinated.[2] Therefore, the trial court properly granted summary

[2] It was not unreasonable for defendant to include personal injury protection under no fault automobile insurance or automobile medical payments insurance within the policies' definitions of "Other Coverage" while excluding treatment for injuries arising out of the ownership, operation, maintenance, or use of a motor vehicle. The litigants, both being insurance
(continued…)

disposition for defendant in regard to coverage for Corso's injuries, but erred in failing to grant summary disposition for defendant in regard to coverage for DeVries' injuries.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Hilda R. Gage
/s/ Brian K. Zahra

(…continued)

companies, are well aware that their policies are sold in numerous states that have varying automobile insurance laws. Thus, there may arise situations in other states where plaintiff would coordinate benefits with personal injury protection under no fault automobile insurance or automobile medical payments insurance.